Supreme Court, U.S.
FILED
NOV 4 - 2009
OFFICE OF THE CLERK

(2)

No. 09-285

IN THE

Supreme Court of the United States

INDIANA STATE POLICE PENSION TRUST, ET AL.,

Petitioners,

v.

CHRYSLER LLC, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT CHRYSLER'S BRIEF IN OPPOSITION

CORINNE BALL
TODD R. GEREMIA
VICTORIA DORFMAN
JONES DAY
222 E. 41st St.
New York, NY 10017
(212) 326-3939

THOMAS F. CULLEN
(Counsel of Record)
GREGORY M. SHUMAKER
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Respondents Chrysler LLC, et al.

NOVEMBER 4, 2009

QUESTION PRESENTED

Section 363(b)(1) of the Bankruptcy Code, 11 U.S.C. § 363(b)(1), allows a trustee or debtor in possession, after notice and a hearing, to sell a debtor's property outside the ordinary course of business. The question in this case whether the Second Circuit properly affirmed the approval of the sale of substantially all of Chrysler's assets for $2 billion pursuant to this provision after examining the record and affirming the bankruptcy court's findings that there was a good business reason for the sale, as it yielded significantly more than the only other available alternative to Chrysler—an immediate liquidation for less than $800 million.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents disclose as follows:

Debtor Old Carco LLC (formerly known as Chrysler LLC) is a Delaware Limited Liability Company. CarCo Intermediate HoldCo II LLC holds 100% of the membership interest in Old Carco LLC. As set forth in more detail below, Old Carco LLC holds, either directly or indirectly, 100% of the ownership interest in all the remaining debtors.

Old Carco LLC directly holds 100% of the ownership interest in the following debtors: Old Carco Aviation Inc. (formerly known as Chrysler Aviation Inc.), TPF Asset, LLC, TPF Note, LLC, Old Carco Institute of Engineering (formerly known as Chrysler Institute of Engineering), Old Carco International Services S.A. (formerly known as Chrysler International Services, S.A.), Old Carco Motors LLC (formerly known as Chrysler Motors LLC), Utility Assets LLC, Old Carco International Corporation (formerly known as Chrysler International Corporation), Old Carco Service Contracts Inc. (formerly known as Chrysler Service Contracts Inc.), Old Carco Transport Inc. (formerly known as Chrysler Transport Inc.), Dealer Capital Inc., DCC 929, Inc., and Peapod Mobility LLC.

Old Carco Motors LLC holds 100% of the ownership interest in the following debtors: Old Carco Realty Company LLC (formerly known as Chrysler Realty Company LLC), Old Carco Vans LLC (formerly known as Chrysler Vans LLC), Global Electric Motorcars, LLC, and Old Carco Dutch Holding LLC (formerly known as Chrysler Dutch Holding LLC).

Old Carco International Corporation holds 100% of the ownership interest in debtor Old Carco International Limited, LLC (formerly known as Chrysler International Limited, LLC).

Old Carco Service Contracts Inc. holds 100% of the ownership interest in debtor Old Carco Service Contracts of Florida, Inc. (formerly known as Chrysler Service Contracts of Florida, Inc.).

Old Carco International Services S.A. holds 100% of the ownership interest in debtor Old Carco Technologies Middle East Ltd. (formerly known as Chrysler Technologies Middle East Ltd.).

Global Electric Motorcars, LLC holds 100% of the ownership interest in debtors NEV Mobile Service, LLC and NEV Service, LLC.

Old Carco Dutch Holding LLC holds 100% of the ownership interest in debtors Old Carco Dutch Investment LLC (formerly known as Chrysler Dutch Investment LLC) and Old Carco Dutch Operating Group LLC (formerly known as Chrysler Dutch Operating Group LLC).

Old Carco International Corporation holds 100% of the ownership interest in Bonsol Holding S.a.r.l. Bonsol Holding S.a.r.l. holds 100% of the ownership interest in Old Carco Canada Holding ULC (formerly known as Chrysler Canada Holding ULC). Old Carco Canada Holding ULC holds 99.99% of the ownership interest in debtor Alpha Holding LP. 3217923 Nova Scotia Company holds the remaining 00.01% of the ownership interest in Alpha Holding LP.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

COUNTERSTATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 10

I. THIS CASE IS NOT A PROPER VEHICLE FOR DECIDING THE QUESTION PRESENTED 10

A. This Petition Is Moot Under § 363(m) Because the Sale Has Already Happened 10

B. Petitioners Lack Standing Because They Cannot Show a Redressable Injury 16

1. Petitioners Consented to the Sale 17

2. Petitioners Were Not, In Any Event, Injured by the Sale 19

II. THERE IS NO CIRCUIT SPLIT ON THE QUESTION PRESENTED 20

III. THERE IS NO REASON FOR THIS COURT TO REVIEW THE FACT-INTENSIVE ISSUES PRESENTED BY THIS PETITION 24

A. The Second Circuit Properly Affirmed the Bankruptcy Court's Findings 24

TABLE OF CONTENTS
(continued)

Page

B. The Asset Sale Here Does Not Present an Issue of "First Impression" 30

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

In re Abbotts Dairies of Pennsylvania, Inc.,
788 F.2d 143 (3d Cir. 1986) 22, 23

Adarand Constructors, Inc. v. Mineta,
534 U.S. 103 (2001) 16

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) 20

In re Braniff Airways, Inc.,
700 F.2d 935 (5th Cir. 1983) 21, 22

Braxton v. United States,
500 U.S. 344 (1991) 20

Bunting v. Mellen,
541 U.S. 1019 (2004) 20

California v. San Pablo & Tulare Railroad Co.,
149 U.S. 308 (1893) 10

In re Charter Co.,
829 F.2d 1054 (11th Cir. 1987) 11

In re Continental Air Lines, Inc.,
780 F.2d 1223 (5th Cir. 1986) 21

In re Decora Industries, Inc.,
No. 00-4459, 2002 WL 32332749 (D. Del.
May 20, 2002) 31

Florida Department of Revenue v. Piccadilly Cafeterias, 128 S. Ct. 2326 (2008) 30, 31

In re Ginther Trusts,
238 F.3d 686 (5th Cir. 2001) 11

TABLE OF AUTHORITIES
(continued)

Page

In re Grand Prix Associates Inc.,
No. 09-16545, 2009 WL 1850966 (Bankr. D.N.J. June 26, 2009) 23

In re Gucci,
126 F.3d 380 (2d Cir. 1997) 12

Herring v. FDIC,
82 F.3d 282 (9th Cir. 1996) 20

Indiana State Police Pension Trust v. Chrysler LLC, 129 S. Ct. 2275 (2009) 9

In re Iridium Operating LLC,
478 F.3d 452 (2d Cir. 2007) 22

Kyles v. Whitly,
514 U.S. 419 (1995)..... 25

In re Lionel Corp.,
722 F.2d 1063 (2d Cir. 1983) 7, 20, 22

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)..... 18

MAC Panel Co. v. Virginia Panel Corp.,
283 F.3d 622 (4th Cir. 2002) 12

In re Magwood,
785 F.2d 1077 (D.C. Cir. 1986)..... 11

McConnell v. FEC,
540 U.S. 93 (2003)..... 18

In re Medical Software Solutions,
286 B.R. 431 (Bankr. D. Utah 2002)..... 31

In re Montgomery Ward Holding Corp.,
242 B.R. 147 (D. Del. 1999) 23

TABLE OF AUTHORITIES
(continued)

Page

In re Naron & Wagner, Ctd.,
88 B.R. 85 (Bankr. D. Md. 1988) 31

Nike, Inc. v. Kasky,
539 U.S. 654 (2003) 17

In re Parker,
499 F.3d 616 (6th Cir. 2007) 11

In re Rare Earth Minerals,
445 F.3d 359 (4th Cir. 2006) 13

Rogers v. Lodge,
458 U.S. 613 (1982) 25

In re Sax,
796 F.2d 994 (7th Cir. 1986) 11

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 18

In re Stadium Management Corp.,
895 F.2d 845 (1st Cir. 1990) 11, 12

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 17, 18

United States v. Salerno,
932 F.2d 117 (2d Cir. 1991) 11

In re UNR Industries, Inc.,
20 F.3d 766 (7th Cir. 1994) 12

STATUTES AND LEGISLATIVE MATERIALS

11 U.S.C. § 363 ..... *passim*

12 U.S.C. § 5211 8

28 U.S.C. § 158 6

TABLE OF AUTHORITIES
(continued)

Page

Congressional Oversight Panel, The Use of TARP Funds in the Support and Reorganization of the Domestic Automotive Industry (Sept. 9, 2009) 15, 28, 32

OTHER AUTHORITIES

Supreme Court Rule 10 25

3 *Collier on Bankruptcy* (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009) 11, 24

Eugene Gressman, et al., *Supreme Court Practice* (9th ed. 2007) 16, 25

INTRODUCTION

The Indiana Funds' submission of this petition is baffling.[1] It presents a moot issue, the Funds do not have standing to further challenge the bankruptcy court's Sale Order, there is no circuit split on the question presented, and the Funds' objection turns on findings of fact by the bankruptcy court that the Second Circuit affirmed on clear-error review.

Petitioners first came to this Court five months ago seeking a stay of the Sale Order. On that application, the Funds bore the burden to demonstrate, among other things, that there was a "reasonable probability" that the Court would grant a petition for certiorari. Justice Ginsburg referred the stay application to the full Court. The Court unanimously denied a stay in a per curiam opinion, and the sale of substantially all of Chrysler's assets for $2 billion to New CarCo Acquisition LLC closed the next day, on June 10, 2009.

This is reason alone to deny the Funds' petition. As petitioners themselves stated in their stay application, "absent a stay, the Sale will close . . . and, as a matter of statute, the case will be moot." (Funds' Stay Appl. 25.) This is because, under § 363(m) of the Bankruptcy Code, the validity of an asset sale is not affected by reversal of an order authorizing it if the purchaser proceeded in good faith. Here, the bankruptcy court found—and

---

[1] The "Indiana Funds," as used herein, refers to the petitioners Indiana State Police Pension Trust, Indiana State Teachers Retirement Fund, and the Indiana Major Moves Construction Fund.

petitioners no longer contest—that New CarCo Acquisition proceeded in good faith. Accordingly, the bankruptcy court's order is now effectively unreviewable.

Even assuming that the question presented here were not moot, however, petitioners would lack standing to raise it. The Second Circuit ruled, and the Funds' petition does not dispute, that the Funds *consented to the Fiat Sale* by operation of agreements that they entered into as part of a Chrysler lending facility. Moreover, even if this Court could unwind the Sale, such an order would not redress, but only worsen, the Funds' putative "injury." The Funds do not challenge the bankruptcy court's findings, affirmed by the Second Circuit, that *only two alternatives were available to Chrysler at the time of the sale*: either (i) consummate the Fiat Sale for $2 billion, or (ii) immediately liquidate the Chrysler assets for less than $800 million.

The Funds have already received their pro rata share of the $2 billion proceeds from the Fiat Sale. (These objectors held only 0.61% of debt in a secured facility, and so received $12.2 million on a distressed investment that they acquired for $17 million.) But if the Sale had not closed, the Funds would have received far less through the liquidation alternative. Any further review in this Court, months after the Sale has closed, thus could not redress any injury that the Funds claim they suffered. Petitoners' suggestion of a "third way"—that more than *$4 billion* in separate transactions entered into by the purchaser, New CarCo Acquisition, with its own creditors and equity holders be unwound and then those assets appropriated for re-distribution to

Chrysler's creditors—has never been a lawful option in the bankruptcy court or any other court, because these were not and are not the debtors' assets.

Aside from all these threshold problems with the petition, there is also no circuit split on the standard to use in approving an asset sale pursuant to § 363(b)(1). All circuits use the same test and cite each other's decisions with approval. Thus, as the Second Circuit noted, petitioners' "arguments boil down to the complaint that the Sale does not pass the discretionary, multifarious . . . test" of whether there is a "good business reason" to sell the debtor's assets. (Appendix to Petition for Certiorari ("App.") 23a.) Here, there clearly was: again, as the lower courts found, the only two choices facing Chrysler were to consummate the Sale for $2 billion or liquidate for far less.

The bankruptcy court did not abuse its discretion in approving the Sale in these circumstances; the Second Circuit did not err in affirming its findings; and this Court did not err when it considered the same issue raised by this petition and unanimously refused to stay the Sale Order. And, even if all of this prior consideration of the Funds' objection had not occurred, this Court does not grant the writ to review an issue as fact-intensive as this one.

There are, in sum, multiple reasons why this certiorari petition should be denied.

COUNTERSTATEMENT OF THE CASE

Petitioners' Statement is largely based on hearsay press accounts and postings on the Internet. The record actually adduced in the bankruptcy court, however, tells a markedly different story.

1. On April 30, 2009, Chrysler LLC and twenty-four of its domestic subsidiaries (collectively, "Chrysler") filed for bankruptcy protection under title 11 of the United States Code. As the court of appeals noted, Chrysler's bankruptcy filing "followed months in which [it] experienced deepening losses, received billions in bailout funds from the Federal Government," and unsuccessfully sought to restructure itself outside bankruptcy. (App. 8a-9a.)

As shown in seven affidavits submitted with its bankruptcy petition, Chrysler commenced these cases to implement a prompt sale of most of its operating assets to preserve its business as a going concern under new ownership and maximize the debtors' recovery for the benefit of their creditors. Section 363(b)(1) of the Bankruptcy Code authorizes this procedure and provides that, after notice and a hearing, a trustee or debtor-in-possession "may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1).

To that end, Chrysler sought the bankruptcy court's approval of a sale of substantially all of its assets to New CarCo Acquisition LLC, a new entity in which Fiat, S.p.A. holds a stake. Under the agreement, hereafter called the "Fiat Sale," (a) Chrysler has sold substantially all of its assets to New CarCo Acquisition in exchange for $2 billion in cash; and (b) Fiat has contributed to New CarCo Acquisition state-of-the-art small car and other technology and expertise, as well as access to a global distribution and purchasing network. The Fiat Sale is financially backed by the U.S. Department of the Treasury and Export Development Canada, an

affiliate of the Canadian Government, which together provided New CarCo Acquisition almost $7 billion in financing. (App. 9a.)

2. On May 3, 2009, Chrysler filed a motion seeking approval to close the Fiat Sale or a similar transaction with some other interested bidder. After two days of hearings, Chrysler obtained the bankruptcy court's approval of a bidding procedure. (App. 128a-129a.) Despite extensive, worldwide publicity regarding Chrysler's situation, the only bid received to conform with the Court's bidding procedures was the offer of New CarCo Acquisition to enter into the Fiat Sale. (Stay App. 27a.) As the Second Circuit noted, "[i]n the months leading up to Chrysler's bankruptcy filing, and during the bankruptcy process itself, Chrysler executives circled the globe in search of a deal. But the Fiat transaction was the *only* offer available." (App. 24a.)

The bankruptcy court conducted a three-day hearing on the sale motion from May 27-29, 2009, during which Chrysler presented testimony from twelve witnesses and introduced dozens of exhibits into evidence. (App. 10a n.1.) The Funds, which hold less than 1% of $6.9 billion in debt under Chrysler's senior secured credit facility, were the sole lender that objected to the Sale Order. (App. 129a-130a.) They did not, however, present any evidence.

In its order approving the Sale, the bankruptcy court overruled all of the objections. As to the petitioners' objections, the court held, among other things, that (i) the proposed Fiat Sale was the product of sound business judgment (App. 137a), (ii) Chrysler received the consent to the sale from the holder of the first lien on the assets that secure

Chrysler's repayment obligations under an Amended and Restated Collateral Trust Agreement, dated November 29, 2007 (App. 148a), (iii) despite exhaustive efforts the Fiat Sale was Chrysler's only alternative to an immediate liquidation of Chrysler's assets for between $0 and $800 million (App. 139a-142a, 163a), and (iv) the $2 billion purchase price was fair, provides more than market value, and far exceeded the value Chrysler would have realized if the Fiat Sale were not consummated. (App. 139a-142a.) The bankruptcy court also found that, in light of the ongoing deterioration of Chrysler's assets, any material delay in closing the Fiat Sale would likely have killed it—depriving Chrysler, its stakeholders, and the public of substantial benefits. (App. 137a-139a.)

The bankruptcy court made detailed findings, which are not contested in the petition, that New CarCo Acquisition entered into the sale in good faith. (App. 161a-165a.) This is a critical finding at this stage because—as explained further below—under § 363(m) of the Bankruptcy Code, where the purchaser has proceeded in good faith, the reversal or modification on appeal of an order authorizing an asset sale "does not affect the validity of a sale," unless the order had been stayed pending appeal. 11 U.S.C. § 363(m).

3. The petitioners appealed to the district court from the bankruptcy court's order. Chrysler moved in the bankruptcy court and then in the Second Circuit for a direct appeal to the Second Circuit, pursuant to 28 U.S.C. § 158(d). On June 2, 2009, the Second Circuit accepted the appeal and stayed the

bankruptcy court's orders pending appellate review. (Stay App. 70a-73a.)

In light of the imminence of a June 15, 2009 date by which the Fiat Sale had to close under the terms of the deal (App. 25a), the Second Circuit ordered expedited briefing by noon on June 4, 2009 and scheduled oral argument for the next day. (Stay App. 72a.) After hearing argument for nearly two hours and then adjourning for a conference, Chief Judge Jacobs read an order from the bench affirming the bankruptcy court's order and stating that the Court's opinion "will issue in due course." (Stay App. 74a.)

The Second Circuit issued its opinion on August 5, 2009, affirming the bankruptcy court. Applying the standard for evaluating § 363 sales set forth in *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983), the court held that the bankruptcy court properly exercised its discretion in finding that Chrysler had the requisite "good business reasons" for selling substantially all of its assets. (App. 24a-26a.) The court emphasized that Chrysler's "revenues [were] sinking, its factories dark, and its massive debts growing," and thus, "Chrysler fit the paradigm of the melting ice cube," that is, a situation where a prompt sale of assets in bankruptcy is warranted to protect the debtor's creditors because the assets' value is declining rapidly. (App. 25a.)

The Second Circuit rejected petitioners' argument that the Sale was an "impermissible, *sub rosa* plan of reorganization" that short-circuited Chapter 11 protections. (App. 12a, 23a.) On this point, the appellate court upheld the bankruptcy court's findings that the Sale "in no way" upset the Bankruptcy Code's priority scheme because "'[n]ot

one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders.'" (App. 23a.) Further, the Fiat Sale does not "specifically 'dictate,' or 'arrange' *ex ante*, by contract, the terms of any subsequent plan" of reorganization for Chrysler, as in the cases that dealt with this sort of "*sub rosa*" allegation. (App. 22a n.9.)

The Second Circuit further held that petitioners' consent to the sale was valid even if they later objected because, pursuant to three separate agreements, they ceded their power to consent to the Sale to the lenders' agent. (App. 27a.) That agent then properly consented to the sale based on the vote of lenders holding a majority of the first lien debt. (App. 27a.)

The Second Circuit declined to rule on petitioners' argument that the Secretary of the Treasury "exceeded his statutory authority and violated the Constitution by using money" from the Troubled Asset Relief Program ("TARP"), 12 U.S.C. § 5211(a)(1), to fund the Sale. (App. 23a-30a, 32a.) The court held that petitioners cannot allege injury in fact because, absent a sale, "the only viable alternative—liquidation—would yield an even *lower* return than the one achieved through the sale funded by TARP money." (App. 34a-35a.)[2]

---

[2] Petitioners are not seeking review of the TARP funding issue. Therefore the extensive discussion of it by amici is irrelevant here. In any event, for the reasons stated by the Second Circuit (App. 29a-35a), petitioners lack standing to raise this issue.

4. When the Second Circuit issued its affirmance from the bench on June 5, 2009, it ruled that the stay it had ordered pending the appeal would continue until the earlier of 4:00 p.m. on June 8, 2009 or the time at which an application for a stay was denied by the U.S. Supreme Court. (Stay App. 74a.)

On June 7, 2009, the Funds and a group of other objectors applied for a stay to Justice Ginsburg, as the Circuit Justice for the Second Circuit. Justice Ginsburg ordered an administrative stay pending further order just before 4:00 p.m. on June 8, and referred the stay applications to the entire Court. The full Court unanimously denied the stay on June 9. In its per curiam opinion, the Court noted that an applicant for a stay must demonstrate (i) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," (ii) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous," and (iii) "a likelihood that irreparable harm will result from [a] denial of a stay." *Ind. State Police Pension Trust v. Chrysler LLC*, 129 S. Ct. 2275, 2276 (2009) (per curiam) (internal quotation marks omitted). Upon consideration and denial of the Funds' application, which asserted the same basis for granting certiorari that is presented in this petition, the Court ruled that the "applicants have not carried th[eir] burden" under this three-part test. *Id.* at 2277.

The next day, on June 10, 2009, the Fiat Sale closed. Co-applicants for a stay, petitioners Center for Auto Safety, other consumer groups, and the "Ad Hoc Committee of Consumer-Victims of Chrysler LLC," along with three individual petitioners,

submitted their petition for certiorari to the Court on June 9, 2009, before the Court denied the applicants' request for a stay. Just before any response to it was due, all these petitioners submitted separate motions to withdraw their petition.

The Funds did not file their petition seeking review of the bankruptcy court's Sale Order until September 3, 2009, the last day of the 90-day period for doing so and nearly three months after the Fiat Sale had closed.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT A PROPER VEHICLE FOR DECIDING THE QUESTION PRESENTED

"[T]he court is not empowered to decide moot questions or abstract propositions, or to declare . . . principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893). Yet, this is exactly what petitioners are asking this Court to do.

A. This Petition Is Moot Under § 363(m) Because the Sale Has Already Happened

As a threshold matter, this petition should be denied as moot.

Under Section 363(m) of the Bankruptcy Code, the reversal or modification on appeal of an order approving a sale does not affect the validity of the sale where, as here, there has been a finding that the purchase was made in good faith:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a

> sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). Section 363(m) is "a per se rule automatically mooting an appeal if the appellant did not obtain a stay pending appeal of the order authorizing the sale." 3 *Collier on Bankruptcy* ¶ 363.11 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).[3] The rule is simple, straightforward, and absolute: no stay of a sale order, no further challenge to the validity of the sale.

Here, because the Fiat Sale closed after this Court denied the stay applications, any further review of the order that approved the sale is moot. Indeed, petitioners themselves acknowledged in their stay application that, if the Court denied the stay (as the Court did) and the sale occurred (as it has), this case would be moot: "[A]bsent a stay, the Sale will close . . . and, as a matter of statute, the case will be moot." (Funds' Stay Appl. 25; *see also id.* (once the Sale closes, § 363(m) "will essentially prevent it from

---

[3] *See also, e.g., In re Parker*, 499 F.3d 616, 621 (6th Cir. 2007); *In re Ginther Trusts*, 238 F.3d 686, 689 (5th Cir. 2001); *United States v. Salerno*, 932 F.2d 117, 122-23 (2d Cir. 1991); *In re Stadium Mgmt. Corp.*, 895 F.2d 845, 847 (1st Cir. 1990); *In re Charter Co.*, 829 F.2d 1054, 1056 (11th Cir. 1987); *In re Sax*, 796 F.2d 994, 997 (7th Cir. 1986); *In re Magwood*, 785 F.2d 1077, 1080-81 (D.C. Cir. 1986).

being reversed").)[4] This is because, as petitioners also stated in their stay application, "[m]any courts have held that, once . . . [the] opportunity to stay the matter has passed, it is neither feasible nor equitable to go back and disrupt the process." (Funds' Stay Appl. 26.)[5]

This statutory finality rule maximizes the value of § 363(b)(1) asset sales—and thereby maximizes the recovery for the debtor's creditors—by removing the risk of further litigation once a court determines that a stay of an approved sale is not warranted. *See In re Gucci*, 126 F.3d 380, 387 (2d Cir. 1997) ("Section 363(m) maximizes the purchase price of assets because without this assurance of finality, purchasers could demand a large discount for investing in a property that is laden with the risk of

---

[4] Co-applicants for stay (Center for Auto Safety, et al.), who withdrew their petition for certiorari on August 7, 2009, agreed that the ruling would become moot once the sale had gone through. (Center for Auto Safety Stay Appl. 13 ("[A]bsent a stay, the sale will go through. . . . After that, the ruling below would, in light of § 363(m), be effectively unreviewable by this Court, even if the Court would have determined the issues differently on their merits.").)

[5] Applicants cited *MAC Panel Co. v. Virginia Panel Corp.*, 283 F.3d 622, 626 (4th Cir. 2002) ("granting the relief requested by [the petitioner] on appeal would require the bankruptcy court to traverse a totally impractical, perhaps impossible, course—one that might be as daunting as the reconstruction of Humpty Dumpty."); *In re UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir. 1994); and *In re Stadium Management Corp.*, 895 F.2d at 847 ("Absent a stay, the court must dismiss a pending appeal [of a § 363 sale] as moot because the court has no remedy that it can fashion even if it would have determined the issues differently.").

endless litigation as to who has rights to estate property."). "An asset that provides a near-certain guarantee of litigation and no guarantee of ownership is likely to have a low sale price; by removing these risks, § 363(m) allows bidders to offer fair value for estate property. This in turn, of course, greatly benefits both the debtor and its creditors." *In re Rare Earth Minerals*, 445 F.3d 359, 363 (4th Cir. 2006) (citations omitted).

The Funds recognize in their petition for certiorari, as they must, that "in the absence of a finding of bad faith, section 363(m) . . . proscribes undoing the sale." (Pet. 3; *see also* Pet. 40.) *This proposition disposes of the Funds' petition*, because the bankruptcy court found, the Second Circuit affirmed, and the Funds do not challenge in their petition that the parties here acted in good faith. Accordingly, after this Court denied the Funds' stay application, the Fiat Sale closed.

The Funds' only half-hearted attempt to address why their petition is not moot in light of the prior proceedings here appears on the very last page of their petition. They say they "do not seek to unwind th[e] sale by this appeal." (Pet. 40.) Rather, they purportedly "seek reversal of the Transaction Orders *only* to the extent that the distribution of proceeds was inequitable," such as, "for example, by compelling the VEBA and the UAW to return to the bankruptcy estate the $4.6 billion note and common stock that they received under the transaction." (Pet. 41 (emphasis added).)

As an initial matter, the premise of the Funds' notion here is wrong. The Second Circuit stated at the outset of its opinion that the order on appeal

"authoriz[ed] the sale of substantially all of the debtor's assets to New CarCo Acquisition LLC." (App. 8a.) It is *that* order which the Second Circuit reviewed and affirmed on appeal, and that would be before this Court for review if the Funds' petition for certiorari were granted. Indeed, contrary to the Funds' statement on the last page of their petition, the Funds make it abundantly clear elsewhere in their petition that they are seeking review in this Court of the propriety of the Sale Order.[6] Any further review of that Order is now moot, however, as the Funds expressly acknowledged in their stay application to this Court.

Moreover, the Funds' proposed remedy is predicated on the same fundamental misconception of the Fiat Sale that infects their entire petition. The remedy that petitioners say they might seek here is to ask the Court to appropriate and re-distribute property of the purchasers' creditors and shareholders. But that was *never* property of the debtors' estate over which the bankruptcy court had any authority, "equitable" or otherwise. Specifically, the "$4.6 billion note and common stock" in New CarCo Acquisition that VEBA and the UAW received from New CarCo Acquisition are *not* "proceeds" of

---

[6] *See, e.g.*, Pet. 17 ("*Certiorari* is warranted because the transaction approved in this case goes well beyond what Congress contemplated . . . ."); Pet. 28 (arguing, wrongly as shown *infra*, that "the approved transaction most likely would have been denied" in the Fifth Circuit and that this "provides a powerful rationale for granting *certiorari*"); Pet. 36 (arguing that "section 363 sales may not be used as a 'side door' restructuring statute, and the Court should grant *certiorari* to settle that question").

"the bankruptcy estate" and were *not* conveyed by Chrysler as part of the sale of substantially all of its assets to New CarCo Acquisition, as the Funds suggest.

To the contrary, as the bankruptcy court found after a full hearing and the Second Circuit affirmed on clear-error review: "'Not one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders.'" (App. 23a.) The bankruptcy court further determined: "In negotiating with those groups essential to its viability, New Chrysler made certain agreements and provided ownership interests in the new entity, which was neither a diversion of value from the Debtors' assets nor an allocation of the proceeds from the sale of the Debtors' assets." (App. 144a.) Indeed, "[t]he allocation of ownership interests in the new enterprise is irrelevant to the estates' economic interests." (App. 144a.) Accordingly, the lower courts found that "*all the equity stakes in New Chrysler* were entirely attributable to new value—including governmental loans, new technology, and new management—which *were not assets of the debtor's estate.*" (App. 23a (emphasis added)).[7]

---

[7] A recent report published by the Congressional Oversight Panel on The Use of TARP Funds in the Support and Reorganization of the Domestic Automotive Industry (Sept. 9, 2009) ("TARP Report") stated that "New Chrysler, a totally new entity that purchased the assets of Old Chrysler, was able to bargain directly with the UAW in the same way that any company can bargain, without any restraints imposed by bankruptcy laws." *Id.* at 115. "To mandate a different result," as the Funds suggest with their outrageous proposal to avoid the fatal defect with their petition, "would risk undermining the

Review of the Sale Order would thus not give any court the legal authority to revise the capital structure of non-debtor New CarCo Acquisition or order New CarCo Acquisition to "return" to the debtors "only" more than $4.6 billion of property that never belonged to the bankrupt estate. After this Court denied the Funds' stay application, the Fiat Sale was completed, and the parties' expectations in connection with it are now settled.

Under § 363(m) of the Bankruptcy Code, the Funds' petition is therefore moot. On this ground alone, it should be denied.

B. Petitioners Lack Standing Because They Cannot Show a Redressable Injury

The Court also should deny the petition because, on two separate grounds, petitioners lack standing to seek to invalidate the Sale Order. First, the petitioners consented to the Fiat Sale. Second, under unchallenged bankruptcy court findings, the petitioners would have recovered *less* if the Fiat Sale had not been approved and instead Chrysler had been liquidated.

"The Court is insistent upon compliance with the Article III case-or-controversy requirement," and "will not review" a case where a party lacks standing. Eugene Gressman, et al., *Supreme Court Practice* 505 (9th ed. 2007). Indeed, if the Court grants a petition and thereafter discovers lack of standing, it will dismiss the writ as improvidently granted. *See, e.g.*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S.

---

certainty of the bankruptcy and contract laws on which commerce in the United States relies." *Id.*

103, 109-11 (2001) (per curiam); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (per curiam); *id.* at 657-58 (Stevens, J., concurring) (noting that lack of standing is an independent and sufficient ground for dismissal). The "'irreducible constitutional minimum of standing,'" which petitioners bear the burden to show, contains three requirements: injury-in-fact, causation and redressability. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1998) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

1. Petitioners Consented to the Sale

The Funds do not have standing here because they consented to the Fiat Sale, as the bankruptcy court determined in a ruling that was affirmed by the Second Circuit and is not challenged in this petition.

As the Second Circuit ruled, "[t]hrough a series of agreements, the [petitioners] effectively ceded to an agent the power to consent to such a sale; the agent gave consent; and the [petitioners] are bound." (App. 27a.) As the appellate court explained, the collateral under the First Lien Credit Agreement is "held by a designated trustee for the benefit of the various lenders (including the Indiana Pensioners)." (App. 27a.) In the event of a bankruptcy, the trustee has the authority to take any action deemed necessary to protect, preserve, or realize upon the collateral. (App. 27a.) The trustee may only exercise this power at the direction of the lenders' agent; but the lenders "are required to authorize the agent to act on their behalf, and any action [that] the agent takes at the request of lenders holding a majority of Chrysler's debt is binding on *all* lenders . . . ." (App. 27a (emphasis added).)

Here, the lenders' agent, acting at the instruction of lenders holding more than 97% of Chrysler's debt, directed the collateral trustee to consent to the Fiat Sale; and, in accordance with the governing agreements, the collateral trustee then consented to the sale of substantially all of Chrysler's assets free and clear of the liens that secured the lenders' claims. (App. 27a.) Thus, as the Second Circuit ruled, "the secured lenders [including the Funds] have consented to the Sale." (App. 11a.)

On this petition, the Funds do not challenge this ruling. Accordingly, even if the petitioners had a redressable injury here (and they do not, as explained below), that injury would be traceable to the actions of either petitioners themselves—who "contracted away" their right to object to action taken by the collateral trustee at the direction of the lenders' agent (App. 27a)—or the collateral trustee, not the debtors. Either way, the Funds do not have standing to seek to invalidate the Sale Order as a remedy. *See McConnell v. FEC*, 540 U.S. 93, 228 (2003) (plaintiffs lacked standing because their injury was caused by "their personal choice" and not defendants' actions); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976) (traceability prong not met where allegations of causation by plaintiff are "speculative" and may have in fact been caused by another party's actions); *Lujan*, 504 U.S. at 561-62 (injury that is the result of the independent action of some third party not before the court makes constitutional minimum on standing much more difficult to show).

2. Petitioners Were Not, In Any Event, Injured by the Sale

The Funds also lack standing because they have not sustained a redressable injury caused by the Fiat Sale. *See Citizens for a Better Env't*, 523 U.S. at 103 (to have standing, petition must show a "likelihood that the requested relief will redress the alleged injury").

Under bankruptcy court findings that were affirmed on appeal—and again are not challenged by this petition—Chrysler had only two alternatives by the time it was in bankruptcy: consummate the Fiat Sale for $2 billion, or immediately liquidate its assets for less than $800 million. (App. 24a-25a.) As the Second Circuit explained: "The Sale would yield $2 billion. According to expert testimony—not refuted by the objectors—an immediate liquidation of Chrysler as of May 20, 2009 would yield in the range of nothing to $800 million." (App. 24a-25a (footnote omitted).)

The only two alternatives facing the Funds and other first-lien lenders were thus to recover their *pro rata* percentage of either (i) the $2 billion proceeds from the Fiat Sale (in the Funds' case, $12.2 million, which they have recovered); or (ii) less than $800 million under a liquidation scenario. Accordingly, petitioners would have fared no better, and, in fact, would have received far *less*, if the Fiat Sale had not occurred.

And so, even if the Fiat Sale could be undone now, that remedy would not redress petitioners' alleged injuries. For this separate reason, petitioners lack standing to challenge the Sale Order, and that is yet another threshold ground on which their petition

should be denied. *See, e.g.*, *Herring v. FDIC*, 82 F.3d 282, 284-85 (9th Cir. 1996) (shareholders of insolvent bank lack standing to assert fraud claim against receiver because, even if they were to prevail, any recovery would go to creditors and nothing would be left for shareholders); *cf. ASARCO Inc. v. Kadish*, 490 U.S. 605, 614 (1989) (taxpayers' alleged injury was not redressable because, if they were to win, the state might adjust the pertinent scheme and so "[t]he possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is 'remote, fluctuating and uncertain'").

II. THERE IS NO CIRCUIT SPLIT ON THE QUESTION PRESENTED

The petition should be denied for the additional reason that there is no circuit split on the question presented. *See Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (Stevens, J.) (noting that a main reason "justifying a denial of certiorari is the absence of a direct conflict among the Circuits"); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (resolving circuit splits is a "principal purpose" for the Court's exercise of its certiorari jurisdiction) (citing Sup. Ct. R. 10)).

Petitioners themselves note that the "good business reason" standard first used by the Second Circuit in *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983), and applied by the Second Circuit in this case, has been adopted by the Fourth, Sixth, and Seventh Circuits. (Pet. 25-26 (citing *In re Modanlo*, 266 F. App'x 272, 274 (4th Cir. 2008); *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1017 (7th Cir. 1988); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986)).) According to petitioners, though, the Third

and Fifth Circuits have adopted "competing standards." (Pet. 25.) That is not correct.

As the Second Circuit itself noted, the Fifth Circuit has adopted the same standard that the Second Circuit uses. (App. 15a n.5.) In *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986), the Fifth Circuit expressly held, "We also agree with the Second Circuit that implicit in § 363(b) is the further requirement of justifying the proposed transaction. That is . . . there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business." *Id.* (citing *Lionel*, 722 F.2d at 1071). The Court went on to quote in its entirety the Second Circuit's non-exhaustive list of factors that may "'provide guidance to the bankruptcy judge'" in applying this standard. *See id.* (quoting *Lionel*, 722 F.2d at 1071).

Petitioners contend that the Fifth Circuit adopted a so-called "'*sub rosa*' plan test" in *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983), which pre-dates the Fifth Circuit's decision in *Continental Air Lines* where it expressly adopted the test used by the Second Circuit. (Pet. 27.) As the Second Circuit explained, however, this test does *not* conflict with the "good business reason" test. The allegation that a § 363 asset sale is "a 'sub rosa plan' in the *Braniff* sense" means that the plan impermissibly "'dictate[s],' or 'arrange[s]' *ex ante*, by contract, the terms of any subsequent plan." (App. 22a n.9.) The sale of substantially all of Chrysler's assets is not a "*sub rosa* plan" in this sense because the Sale Order did not dictate the terms of any plan of reorganization. (App. 22a-23a & n.9.) Nor did the Court in *Lionel* have to deal with the sort of

allegation that the Fifth Circuit dealt with in *Braniff*. (App. 22a.)[8]

As the Second Circuit explained, however, where a court *is* confronted with an allegation of a "*sub rosa*" plan, it "may approve or disapprove a § 363(b) [sale] . . . using the analysis set forth in *Lionel*." (App. 22a (citing *In re Iridium Operating LLC*, 478 F.3d 452, 466 (2d Cir. 2007)).) Indeed, in the recent *Iridium* decision, the Second Circuit applied the "good business reason" test from *Lionel* and also noted the concern that "[t]he trustee is prohibited from such use, sale or lease if it would amount to a *sub rosa* plan of reorganization." *Iridium*, 478 F.3d at 466 & n.21 (citing *Lionel*, 722 F.2d at 1071).

There is thus no "conflict" between the Second and the Fifth Circuits on this issue. Nor is there a conflict with the Third Circuit. Petitioners say that the Third Circuit "has held that when a bankruptcy court authorizes a sale of all or substantially all of the assets of a debtor under Section 363(b)(1), it is required to make a finding of 'good faith.'" (Pet. 27 (quoting *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147-50 (3d Cir. 1986)).) That is true, but irrelevant to the question presented here. In *Abbotts Dairies*, the Third Circuit dealt solely with whether an appeal from a sale order was moot pursuant to § 363(m), under which, as discussed above, a reversal

---

[8] In *Braniff*, the proposed sale dictated how the debtor would allocate certain assets to its creditors and shareholders in a future reorganization. *See* 700 F.2d at 939-40. *Lionel*, on the other hand, concerned a sale of the debtor's most important asset for $43 million in cash, with the proceeds to be distributed pursuant to a plan of reorganization. *See* 722 F.2d at 1065.

of an order approving a sale does not affect the validity of the sale if the purchaser proceeded in good faith. *See id.* at 144, 147. The court held, as part of its "exercise of [its] supervisory authority over both the district and bankruptcy courts," that a bankruptcy court is required to make a finding of whether the purchaser had acted in bad faith when approving an asset sale, so that "prospective appellants [will be] on notice of the need to obtain a stay pending appeal." *Id.* at 150.

Here, of course, the bankruptcy court made an express finding that New CarCo Acquisition acted in good faith, and for this reason this petition is moot pursuant to § 363(m). If this were the test to determine whether a § 363 sale should be approved, it would have been met here—and there would be no "conflict" presented by this case and what petitioners say is the test used in the Third Circuit. More importantly, though, the Third Circuit's decision in *Abbotts Dairies* did not address whether a sale pursuant to § 363 should have been approved. When courts in the Third Circuit *have* been confronted with that issue, though, they have expressly applied the "good business reason" test used by the Second Circuit. *See, e.g.*, *In re Grand Prix Assocs. Inc.*, No. 09-16545, 2009 WL 1850966, at *4 (Bankr. D.N.J. June 26, 2009) (approval of an asset sale pursuant to § 363 requires "a sound business justification for the transaction pursuant to the seminal case of *In re Lionel Corporation*"); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153-54 (D. Del. 1999) (applying the test from *Lionel*).

There is, thus, no "conflict" among the courts of appeal on what standard to use in determining

whether to approve an asset sale pursuant to § 363(b)(1) of the Bankruptcy Code. *See also Collier on Bankruptcy* ¶ 363.02[1][f] ("[C]ourts generally apply standards that, although stated various[] ways, represent essentially a business judgment test."). In particular, contrary to what the Funds say, the Sale Order would not "have been denied" in the Fifth Circuit as an "impermissible '*sub rosa*' reorganization" (Pet. 28) because, as the Second Circuit explained, the Sale Order here did not dictate the terms of any subsequent plan of reorganization. (App. 22a n.9.) Nor would the Sale Order have been disapproved in the Third Circuit, as courts there use the same test that the Second Circuit does and, in any event, the bankruptcy court found that the Fiat Sale proceeded in good faith.

For this separate reason, the Funds' petition should be denied.

III. THERE IS NO REASON FOR THIS COURT TO REVIEW THE FACT-INTENSIVE ISSUES PRESENTED BY THIS PETITION

Finally, the petition should be denied on the separate ground that the asserted errors are, in the final analysis, factual. (*See* Pet. 33 (arguing that "the facts do not bear out the lower courts' holdings").) The Second Circuit properly held, in accordance with well-established law, that the bankruptcy court did not abuse its discretion or make any clearly erroneous findings of fact in approving the Fiat Sale.

A. The Second Circuit Properly Affirmed the Bankruptcy Court's Findings

Under this Court's rules, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the

misapplication of a properly stated rule of law." Sup. Ct. R. 10. Further, under the "two-court rule," this Court declines to review factual findings "when [the] district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles v. Whitly*, 514 U.S. 419, 456-57 (1995) (Scalia, J., dissenting) (citing *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)).[9]

The petition should be denied under these principles. As the Second Circuit noted, "[t]he Indiana Pensioners' arguments boil down to the complaint that the Sale does not pass the discretionary, multifarious *Lionel* test." (App. 23a.) The bankruptcy court found, and the Second Circuit agreed, that "the only possible alternative to the Sale was an immediate liquidation that would yield far less for the estate—and for the objectors." (App. 24a.) The appellate court further agreed with the bankruptcy court's findings that, despite "Chrysler's prolonged and well-publicized efforts to find a strategic partner or buyer," "the Fiat transaction was the *only* offer available." (App. 24a.) "According to expert testimony," "not refuted by the objectors," while the Sale would yield $2 billion, a liquidation "would yield in the range of nothing to $800 million." (App. 24a-25a.) With business "hemorrhaging cash," and factories "shuttered," "Chrysler fit the paradigm of the melting ice cube" scenario, where an asset sale in bankruptcy is warranted to maximize value for the

---

[9] *See also, e.g., Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts."); Gressman, et al., *supra*, at 271.

debtor's creditors. (App. 25a.) Indeed, petitioners' counsel even conceded that an emergency sale was necessary to preserve the value of Chrysler's assets. (*See* May 29, 2009 Hr'g Tr. 247:24-25; 248:1-11 ("I'm not here to challenge the concept of an emergency sale to protect a melting ice cube. It has to happen. Bankruptcy is flexible to accommodate things like that.").)

The Second Circuit properly concluded, on the basis of the bankruptcy court's findings and under the "good business reason" test, that "the bankruptcy court's approval of the Sale was no abuse of discretion." (App. 25a; *see also* App. 26a ("[I]t was no abuse of discretion to determine that the Sale prevented further, unnecessary losses.").) There is no reason for this Court to grant the petition to review findings by the bankruptcy court that have been affirmed by the Second Circuit. Yet these are the issues that the Funds are raising.

They contend, for instance, that "[e]ssentially, the lion's share of Chrysler's going concern value was distributed to favored junior unsecured creditors, while the First Lien Lenders received no more than what was allegedly liquidation value." (Pet. 33.) That statement cannot be squared with the lower courts' properly supported findings of fact on this issue. The First Lien Lenders decidedly did *not* receive liquidation value. As noted above, the bankruptcy court found—and the Second Circuit affirmed its finding—that the liquidation value of Chrysler was $800 million or less. The Funds, however, received their pro rata share of the $2 billion cash proceeds from the Fiat Sale.

The bankruptcy court also made express findings that the Fiat Sale in no way improperly favored junior unsecured creditors or rearranged the priority scheme of the Bankruptcy Code. That court found that "consideration to these entities is being provided under separately-negotiated agreements with New Chrysler," not as part of "their prepetition claims." (App. 144a-145a.) Among other things, "New Chrysler views the skilled workforce as essential to its future operations and, as a natural consequence, has engaged in negotiations with their representative." (App. 145a; App. 23a.) These negotiations resulted in New Chrysler's assumption of obligations under VEBA, and UAW's consent to "unprecedented modifications to the collective bargaining agreement, including a six-year no-strike clause." (App. 145a.)

Once again, the Second Circuit agreed with the bankruptcy court on this point, holding that the Fiat Sale "in no way upset" the priority scheme of the Code:

> Bankruptcy Judge Gonzalez demonstrated proper solicitude for the priority between creditors and deemed it essential that the Sale in no way upset that priority. The lien holders' security interests would attach to all proceeds of the Sale: "Not one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders." As Bankruptcy Judge Gonzalez found, all the equity stakes in New Chrysler were entirely attributable to new value—including governmental loans, new

> technology, and new management—which were not assets of the debtor's estate.

(App. 23a (citation omitted).)[10]

The Funds also repeat throughout their petition that they were purportedly "strip[ped]" of their "constitutionally protected property rights" by the Sale. (Pet. 17; *see also* Pet. 22 (stating that the Bankruptcy Code "provide[s] creditors with a significant level of due process before their property rights may be permanently altered by a debtor's reorganization").) As shown above, however, both the bankruptcy court and the Second Circuit found that the Funds *consented to* the Fiat Sale, pursuant to agreements to which they were a party. And the Funds do not challenge that ruling in their petition.

Finally, the Funds contend that "the transaction was a 'sale' in form only. Upon consummation, New Chrysler became Old Chrysler in every important respect . . . ." (Pet. 36.) However, the Second Circuit rejected this contention, noting among other facts from the record that (i) New Chrysler will "make newer, smaller vehicles using Fiat technology that will become available as a result of the Sale—moreover, at the time of the proceedings, Old Chrysler was manufacturing no cars at all"; (ii) "New Chrysler will be run by a new Chief Executive Officer, who has experience in turning around failing auto companies"; (iii) New Chrysler's employees "will be working under new union contracts that contain a

---

[10] The TARP Report underscored the same point, stating, "[A]llegations that statutory bankruptcy law priorities were overturned are not accurate." *Id.* at 114 (footnote omitted).

six-year no-strike provision"; (iv) New Chrysler will "have new access to Fiat dealerships in the European market." (App. 26a.) The Second Circuit concluded, based on these facts, that "[s]uch transformative use of old and new assets is precisely what one would expect from the § 363(b) sale of a going concern." (App. 26a.)

As these findings illustrate, the courts here properly approved the sale under any of the formulations of the test proposed by petitioners—even though, as shown above, there is no circuit split on this issue. There was a good business reason for the Fiat Sale, because it garnered far more value for Chrysler's creditors than the only other available alternative. The Sale was not a "*sub rosa*" plan of reorganization, because it did not upset the priority of distribution to Chrysler's creditors. (App. 23a; *see also* Pet. 32.) And the parties to the Sale proceeded in good faith, as the bankruptcy court determined with detailed findings. (App. 63a ("[T]he terms of the Fiat Transaction [were] finalized only after months of intense good faith negotiations."); *see also* App. 139a ("[T]he consummation of the Sale Transaction was conducted in good faith and at arms' length and is in the best interest of the Debtors' estates."); App. 165a ("no allegations . . . that would raise any issue as to the purchaser's good faith").)

The Funds' petition thus amounts to a request that this Court overturn these and other findings of fact by the bankruptcy court that were affirmed (correctly) by the Second Circuit as not clearly erroneous. Under well-established principles, this Court does not ordinarily grant certiorari in these circumstances; and petitioners have not presented

any good reason why this case should be an exception to this rule.

B. The Asset Sale Here Does Not Present an Issue of "First Impression"

Finally, aside from all of the many other grounds for denying the petition, it does not present an "issue of first impression," as petitioners contend. (Pet. 17.) Indeed, although this case may have generated more attention than others, the legal issues it presented were not unusual. Any suggestion that the bankruptcy court invoked some novel procedure to permit Chrysler to sell its assets before confirming a plan of reorganization is wrong.

This Court has noted that § 363(b) may properly be invoked to sell all or substantially all of a debtor's assets. As this Court has recently explained:

> [I]n some cases, as here, a debtor sells all or substantially all its assets under § 363(b)(1) before seeking or receiving plan confirmation. In this scenario, the debtor typically submits for confirmation a plan of liquidation (rather than a traditional plan of reorganization) providing for the distribution of the proceeds resulting from the sale.

Fla. Dep't of Revenue v. Piccadilly Cafeterias, 128 S. Ct. 2326, 2330 n.2 (2008) (citation omitted) (quoted in App. 19a n.8). In that same case, Justice Breyer noted that "one major reason why a transfer may take place *before* rather than *after* a plan is confirmed is that the preconfirmation bankruptcy process takes time. . . . And a firm (or its assets) may have more value (say, as a going concern) where sale takes place quickly. . . . Thus, an immediate sale can

often make more revenue available to creditors or for reorganization of the remaining assets." *Id.* at 2342 (dissenting on a different issue—whether, under § 1146(a) of the Bankruptcy Code, a stamp-tax exemption could be granted in conjunction with a § 363 sale).

The *Piccadilly Cafeterias* case in this Court was one of many examples, in both high- and low- profile bankruptcies, where courts have approved asset sales outside the context of a plan of reorganization to preserve the going-concern value of a debtor's business.[11] Indeed, as the Second Circuit observed,

---

[11] *See, e.g.*, *In re Decora Indus., Inc.*, No. 00-4459, 2002 WL 32332749, at *3 (D. Del. May 20, 2002) (approving 363(f) sale of substantially all assets of chapter 11 debtor that had no source of future financing: "Debtors[] have two alternatives: (1) proceed with the Proposed Transaction, or (2) terminate business operations, employees and commence a liquidation of assets. . . . All parties agree that an asset sale, as opposed to liquidation, will provide more money to the estate to satisfy the creditors' claims, as well as maintaining the going concern value of Debtors."); *In re Med. Software Solutions*, 286 B.R. 431, 441 (Bankr. D. Utah 2002) (court approved sale of essentially all of debtor's assets at outset of chapter 11 case); *In re Naron & Wagner, Ctd.*, 88 B.R. 85, 90 (Bankr. D. Md. 1988) (approving sale of operating subsidiary where purchase price exceeded its estimated liquidation value and "failure to close the sale quickly will likely result in a halt of [subsidiary]'s continuous operations. If [subsidiary] cannot be sold as a going concern, there will be a substantial decrease in its value to the Debtor's estate."). (*See also* App. 17a (quoting Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 Stan. L. Rev. 751, 751-52 (2002) ("'TWA filed only to consummate the sale of its planes and landing gates to American Airlines. Enron's principal assets, including its trading operation and its most valuable pipelines, were sold within a few months of its bankruptcy petition. Within weeks of filing for Chapter 11,

"since *Lionel* [1983], § 363(b) asset sales have become common practice in large-scale corporate bankruptcies." (App. 16a-17a (citing Robert E. Steinberg, *The Seven Deadly Sins in § 363 Sales*, Am. Bankr. Inst. J., June 2005, at 22, 22; Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 Am. Bankr. L.J. 153, 194-96 (2004)).) The TARP Report further explained: "Today, 363 sales often dominate the resolution of a Chapter 11 case by selling all or substantially all of the assets of the business and leaving only the remainder of the assets for distribution in the Chapter 11 plan." *Id.* at 46. And, in describing the Chrysler sale in particular, this same report stated that "[w]hile the speed was noteworthy, it was not unprecedented," *id.* at 50, and that "363 sales had been used to resolve Chapter 11 cases long before the recent Chrysler and GM bankruptcies and that such sales have grown increasingly popular in the last few years." *Id.* at 95.

The Second Circuit acknowledged that resort to § 363 asset sales has "its critics" (App. 18a) and that the thrust of the criticism is still—as it has been for more than twenty-five years—a fear that "one class of creditors may strong-arm" the debtor to "cash out quickly at the expense of other stakeholders." (App. 19a-20a.) That did not happen here, however. As the Second Circuit held, on the basis of the bankruptcy court's supported findings: "Chrysler fit the

---

Budget sold most of its assets to the parent company of Avis. Similarly, Polaroid entered Chapter 11 and sold most of its assets to the private equity group at BankOne."")).)

paradigm of the melting ice cube. Going concern value was being reduced each passing day that it produced no cars, yet was obliged to pay rents, overhead, and salaries." (App. 25a-26a.) In particular, the asset sale brought far more value ($2 billion) to all of the debtor's creditors, including the Funds, than a liquidation would have.

The bankruptcy court did not, in these circumstances, abuse its discretion in approving the Fiat Sale in accordance with well-worn principles of bankruptcy law. Nor did the Second Circuit err in affirming the Sale Order.

CONCLUSION

The petition should be denied.

Respectfully submitted,

CORINNE BALL
TODD R. GEREMIA
VICTORIA DORFMAN
JONES DAY
222 E. 41st St.
New York, NY 10017
(212) 326-3939

THOMAS F. CULLEN
(Counsel of Record)
GREGORY M. SHUMAKER
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Respondents Chrysler LLC, et al.

NOVEMBER 4, 2009